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Nos. 118, 414

In the Supreme Court of the United States

OCTOBER TERM, 1929

FLORSHEIM BROTHERS DRY GOODS COMPANY, LTD., PETITIONER

v.

THE UNITED STATES OF AMERICA

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

HOOD RUBBER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUBMITTED AFTER THE HEARING

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The purpose of this memorandum is to answer certain suggestions which were made during the course of the argument, chiefly as to the effect of the tentative returns on form 1031–T.

I

It was suggested that if the Commissioner made assessments based merely on the tentative returns, such returns might be considered as the returns required by the statute.

In neither of the instant cases does the record show that any assessment was made on the basis of the tentative return. As a matter of fact, the practice of the Commissioner was not to make assessments on the basis of tentative returns, and we are informed by persons who were employed in the Bureau of Internal Revenue in 1919, and who are still so employed, that the Commissioner did not make assessments of taxes for the calendar year 1918 until after the expiration of the time for filing completed returns, as extended. If this practice was departed from in some cases, it was only because of inadvertence. Evidently the Collectors were instructed not to list tentative returns except where it was found impossible to secure a final return. (See extract from Sections 627 and 628, Internal Revenue Manual, Part II, published 1920, pp. 14–15, *infra.*) Just when these Instructions were issued we are unable to ascertain. Cf. Letter of May 5, 1919, p. 19, *infra.*

Assessments could be made only by the Commissioner. (See R. S. 3182; *Fidelity Trust Co.* v. *Commissioner,* 10 B. T. A. 482, 487.) An assessment is made by the signing of an assessment list. This list is prepared in the first instance by the Collector, and forwarded to the Commissioner. (See Article

1012, Treasury Regulations, pp. 7–8, *infra.*) The Commissioner, on August 13, 1924, stated in a circular letter to Collectors of Internal Revenue: "An assessment is made on the date when the assessment list is signed by the Commissioner." (See letter of August 13, 1924, p. 18, *infra.*)

II

It was suggested that the fact that the Collector sent a memorandum in regard to the second instalment of the tax to the Hood Rubber Company showed that the Government treated the tentative return as a sufficient basis on which to make a demand for the payment of taxes.

The memorandum referred to, dated June 16, 1918, is copied in R. 17 of the *Hood case,* No. 414 (and there by typographical error dated June 16, 1919. See R. 15). It emanated merely from the Collector, and it does not show that the Government had then determined the amount of the tax due. As shown in the agreed statement of facts, this related merely to the second instalment of the amount of tax shown by the tentative return. (R. 15.) At the time when this was sent out, the final return had not been filed. This was filed July 14, 1919. (R. 15.)

We submit that no significance attaches to this so-called "demand." One of the conditions upon which the extension of time for filing the completed return was granted was that the taxpayer should pay the estimated tax. (See letters of the Commis-

sioner of February 13 and 27, 1919, pp. 9, 12, *infra.*) The fact that payment of the first instalment accompanies the filing of any return shows that assessment of the tax does not necessarily or ordinarily precede collection. The notice to the Hood Rubber Company dated June 16, 1918, is similar to the statement on form 1031–T that one-fourth of the estimated tax must reach the Commissioner's Office on or before March 15, 1919. Both are based solely upon taxpayer's tentative return of his tax, and neither indicates that the tax has been assessed or that the tentative return has been treated as fulfilling the requirements of a completed return.

III

During the argument there was some discussion as to the effect of the procedure adopted upon the imposition of a penalty for failure to make a return on time.

Under the procedure adopted it seems to have been contemplated that this would be imposed only for failure to make the completed return within the time as extended. The mere filing of the tentative return did not operate to relieve the taxpayer of this penalty. The provisions of Article 407 of Regulations 45, quoted on pp. 25–26 of petitioner's brief in the *Florsheim case,* No. 118, do not apply to form 1031–T, but to "a statement made by taxpayer disclosing his gross income and the deductions therefrom" on a form other than the regular printed form. A letter of October 3, 1919, from

the Commissioner to the Collectors, shows that the Commissioner contemplated that a failure to file the completed return would involve the imposition of a penalty even if the taxpayer had filed a tentative return on form 1031–T. (See p. 16, *infra.*)

IV

Further evidence of the fact that the Government did not regard the tentative return on form 1031–T as taking the place of the completed return is found in the fact that the Solicitor of Internal Revenue ruled that a tentative return on form 1031–T made after the passage of the Revenue Act of 1918 is not "a return" within Section 250 (b) of the Act imposing a penalty on false or fraudulent understatements made with intent to evade the tax. (See extract from opinion of March 17, 1920, pp. 16–18, *infra.*)

V

It was suggested during the argument that, regardless of the effect of the tentative return, the period of limitations should should start to run from March 15, 1919, because Section 250 (d) of the Revenue Act of 1918 provided that the "amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return *was due or was made.*" The question as to the effect of the words *was due* is immaterial in these cases. The five-year period, even calculated from March 15, 1919, had not expired

when the Revenue Act of 1921 took effect, as of January 1, 1921 (42 Stat. 227, 271). Section 250 (d) of the 1921 Act provided that the amount of taxes due under prior tax Acts "shall be determined and assessed within five years after the return *was filed.*" Section 277 (a) (2) of the Revenue Act of 1924 contained the same language. (The section of the 1924 Act which operates in the instant cases is not Section 277 (a) (2), but 278 (c) and (d)). (The sections in the Revenue Acts of 1918, 1921, and 1924 herein referred to are copied on pp. 23–26 in the Appendix to the Government's original brief in the instant cases.)

Extracts from all statutes, regulations, and other departmental documents throwing any light upon the questions herein discussed which we have been able to find (except those mentioned in our brief) are printed as an appendix hereto.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

JANUARY, 1930.

APPENDIX

STATUTES

Section 1309 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1143 (approved February 24, 1919), provides in part as follows:

> That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

Section 3182 of the Revised Statutes provides:

> The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties * * * and shall certify a list of such assessments when made to the proper collectors respectively, * * *.

REGULATIONS

Article 1012 of Treasury Regulations 45 (1920 ed.) provides:

> *Assessment of tax.*—When the returns are received at the collectors' offices, they are examined and listed before being forwarded to the Commissioner. If it appears that the tax is greater or less than shown in the return, it is recomputed. After checking the figures the Commissioner assesses the tax on the basis of the collectors' lists. The collectors then send out bills for the taxes, either as computed by the tax-

payer or as recomputed. If a taxpayer believes that he has been overassessed, he may file a claim for abatement or (after payment of the tax) for a refund of the excess. See section 252 of the statute and articles 1031–1038. As soon as practicable the returns are carefully audited by accountants in the office of the Commissioner at Washington, assisted where necessary by reports of the examination of taxpayers' books and records made by revenue agents in the field. If error in a return is detected, the taxpayer is notified accordingly and an additional assessment is made against him or he is given the opportunity to file a claim for a refund, as the case may be. Any assessment must be made within five years after the return was due or was made, except in the case of false or fraudulent returns with intent to evade the tax. See sections 228, 1305 and 1318 of the statute and articles 451 and 1711.

LETTER FROM COMMISSIONER TO COLLECTORS DATED FEBRUARY 13, 1919

To Collectors of Internal Revenue and others concerned:

Although no general extension of time will be authorized for filing Federal Income Tax returns due March 15, the Commissioner of Internal Revenue has approved a novel feature of tax collection which will serve for all practical purposes as a possible extension of forty-five days for the filing of corporation income and excess profits tax returns in cases where corporations are unable to complete and file their returns of March 15.

If a corporation finds that, for good and sufficient reason, it is impossible to complete

its return by March 15, it may make a return of the estimated tax due and make payment thereof not later than March 15. If meritorious reason is shown as to why the corporation is unable to complete its return by the specified date, the collector will accept the payment of the estimated tax and agree to accept the revised and completed tax return within a period of not more than 45 days.

Under the plan adopted for corporation payments and returns, the Government will be able to collect approximately the amount of tax due on or before March 15, thus meeting its urgent needs, and corporations actually requiring further time for the preparation of their complete returns will be granted ample time in which to do so.

One of the advantages of this plan is that it relieves the taxpayer of one-half of one per cent interest per month that would be attached to the payment of the taxes under an extension granted at the request of the taxpayer. The taxpayer will, of course, not be relieved of interest on such amount as his payment may fall short of the tax found later to be due on the basis of his final return.

Should the payment on March 15 of the estimated tax due be greater than the tax eventually found to be due on examination of the completed return the excess payment will automatically be credited to the next installment which will be due on June 15.

Provision for systematically handling this new feature will be made in the construction of the new return blanks for corporations.

The new form will be a combined income and excess profits blank, embodied in which

is a detachable letter of remittance. Any corporation which finds that, for sufficient reasons, it can not complete its return by March 15, may detach and fill out the letter of remittance, and forward same to the collector on or before March 15, together with a check, money order or draft for the tax due on that date. If the exact tax is not known the estimated tax due will be paid in this manner. A statement in writing of the reasons why it is impossible for the corporation to complete the return by the specified date must accompany every such remittance.

Individual taxpayers will be given similar privileges in cases in which it is made clear by the taxpayer that the time available is not sufficient to enable him to complete his return by March 15. No reason exists, according to the Internal Revenue officials, for delaying the filing of the returns of individual incomes, except in unusually difficult cases.

Forms for returns of individual incomes up to $5,000 will be distributed by collectors within a few days. Forms for larger incomes will be available about February 24. Corporation blanks will be distributed March 1. Regulations governing the administration of the new Income Tax will also be available before March 1.

DANIEL C. ROPER,
Commissioner of Internal Revenue.

FEBRUARY 13, 1919.

LETTER FROM COMMISSIONER TO COLLECTORS DATED FEBRUARY 27, 1919

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C.

Income taxpayers both corporations and individual, were to-day granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15, to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess profits returns, provided in every case the taxpayer pays on or before March 15 at least 25% of the estimated amount of the tax due.

A supply of blanks of Form 1040–T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of Internal Revenue to-day. Collectors will furnish this Form to any individual requesting an extension of time for the filing of his complete return for 1918.

The tentative return to be used by corporations who make payment of the estimated tax due on or before March 15 is being printed, and a supply will be forwarded to-morrow to each collector, who will mail these Forms to every corporation on his list. (To be known as Form 1031–T.)

Under the estimated tax procedure, which is now available to every taxpayer under the Income and Excess Profits Section of the New Revenue Law, there is no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.

It is urged by the Bureau that the estimates be computed on the most exact basis

available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return the excess payment will be automatically credited against the next installment, which will be due June 15.

The taxpayer will not be relieved, however, under this plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return.

Commissioner Daniel C. Roper, in announcing the further relief for taxpayers in the matter of completing their returns, stated that he believed the plan is not only simple and workable, but adequately protects the interests of the taxpayer and the Government.

February 27, 1919.

TELEGRAM FROM COMMISSIONER TO LEWELLYN, COLLECTOR, DATED MARCH 21, 1919

WASHINGTON, *March 21, 1919.*

LEWELLYN,

Collector, Pittsburgh, Pa.:

Tentative corporation and individual returns forms ten forty T and ten thirty one T should be retained in collector's office until complete returns are filed at which time tentative return should be attached to complete return and forwarded with assessment list twenty three stop Complete return will form basis of assessment stop Checks which accompany tentative returns should be detached and deposited immediately upon their receipt.

ROPER, *Commissioner.*

LETTER FROM COMMISSIONER TO COLLECTORS DATED APRIL 14, 1919

EXTENSION OF TIME FOR COMPLETING CORPORATE RETURNS AND FOR FILING CERTAIN RETURNS NOT THE BASIS FOR ASSESSMENT OF TAX

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., April 14, 1919.

To Collectors of Internal Revenue:

In view of the short time between the date on which forms were available and the due date (March 15th) of calendar year returns required under the Revenue Act of 1918, notice was given through the public press and otherwise that tentative returns (Forms 1031T and 1040T), accompanied by a first instalment of one-fourth of the estimated tax due, would be accepted on that date, and that in such cases forty-five days would be given in which to file complete returns, but that interest at the rate of one-half of 1% per month upon the amounts by which such instalment payments fell short of the correct amounts would be collected.

In the case of corporations which filed Form 1031T on or before March 15th, a further extension, where needed, to June 15, 1919, in which to file complete returns on Form 1120 is hereby granted, but all such corporations will be required to pay on or before June 15th a sum sufficient, with the amount paid on March 15th, to equal one-half the tax due as shown by the return on Form 1120, together with interest at the rate of one-half of 1% per month on any deficiency in the first instalment.

It is not deemed necessary to grant an extension of time beyond the 45 days originally granted for the completion of personal returns, except on special request therefor for sufficient reasons given, but the above ruling as to interest on deficient instalments applies to them.

An extension of time in which to file returns of corporations making returns for a fiscal year ended either on January 31, or February 28, 1919, will on request be granted to June 15, 1919, but such extension shall not operate to extend the due date of any instalment of tax after the first. Interest at the rate of one-half of 1% per month will be collected from the time the first instalment would have been payable if the extension had not been requested.

The time for filing returns of information (Forms 1096 and 1099), fiduciary returns (Form 1041), withholding returns (Form 1042 accompanied by Form 1098 and Form 1013), returns of partnership and personal service corporations required to file returns on a calendar year basis, and all other returns required under the income tax and profits tax provisions of the law, which are not the basis for the assessment of the tax, is also extended to June 15, 1919.

DANIEL C. ROPER,
Commissioner.

EXTRACT FROM INTERNAL-REVENUE MANUAL FOR THE INFORMATION AND GUIDANCE OF COLLECTORS AND THEIR EMPLOYEES

The following appear in Part II (which was printed in 1920, but we are unable to ascertain when these instructions were first issued):

SEC. 627. Tentative returns may be accepted from taxpayers when properly authorized. When the tentative returns are received the amount collected should be taken up in the division of the unidentified collection account to be known as 9c, but classified for deposit as income tax. Tentative returns should not be listed, but for purposes of control may be numbered from zero up and placed in a suspended file. If any large quantities are received, stencils should be cut for the purpose of preparing an index file for cross reference. As the final returns are received the tentatives will be withdrawn from the suspended file and firmly attached to the final. The finals will be numbered in accordance with the regular current monthly series in which they are listed. They will not take the number previously assigned to the tentative return. Upon receipt of the final the amount of tax declared by the taxpayer should then be listed and the taxpayer credited with the amount paid on filing the tentative. At the same time the unidentified collection account 9c should be debited and taxes collectible credited.

SEC. 628. The file of tentative returns should be frequently reviewed and if the finals are not received within the time limit allowed communication should be had with the taxpayer and the final secured. If it is found impossible for any reason to secure a final return for which a tentative was filed, the tentative may be listed as a return paid in full. If the latter procedure becomes necessary, full information setting forth all the facts in the case should be attached to the return and forwarded to the bureau.

LETTER FROM COMMISSIONER TO COLLECTORS DATED OCTOBER 3, 1919

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., October 3, 1919.

To Collectors of Internal Revenue:

In order that all returns required by Titles II and III of the Revenue Act of 1918 for the year 1918 may be immediately available for audit in this office, it is absolutely necessary and essential that such returns be forwarded to this office at the earliest practicable date.

It has been brought to the attention of the office that a number of taxpayers who filed tentative returns or who have been granted an extension from the Commissioner in which to file completed return, have not done so. You will, therefore, immediately notify every taxpayer in your district whose return is due, and who has not filed a completed return, except those who have received an extension of time which has not expired, that unless a completed return is filed within ten days from date of your notice, the 25% penalty will attach.

This matter is of vital importance to this Bureau and these notices should be issued immediately upon receipt of this letter.

DANIEL C. ROPER,
Commissioner.

EXTRACT FROM OPINION OF SOLICITOR OF INTERNAL REVENUE, DATED MARCH 17, 1920

MARCH 17, 1920.

COMMISSIONER OF INTERNAL REVENUE.
(Attention of Committee of Appeals and Review.)

The question has been raised as to whether Goodman, Wallach & Helber, 113

W. Baltimore St., Baltimore, Md., has made false or fraudulent returns of the corporation income tax for the year 1918 and, if so, what penalties shall be enforced.

* * * * *

The tentative return made on Form 1031–T, which shows only the amount of the estimated tax and is to be accompanied by 25 per cent of the estimated tax, is authorized by Regulations No. 45, Article 443, and may be required by the Collector as a condition of granting an extension of time. No other figures need be shown in the tentative return and it would not be possible for the Commissioner to determine from an examination of it, as provided in Section 250 (b), whether the amount of the tax is correctly stated. It seems clear that the tentative return is not the complete return to which Section 250 (b) refers and I am of the opinion that the penalties of Section 250 (b) are not applicable to false or fraudulent statements made on Form 1031–T.

* * * * *

It is therefore held that:

(1) A tentative return on Form 1031–T made after the passage of the Revenue Act of 1918 is not "a return" within Section 250 (b) of the Act imposing a penalty on false or fraudulent understatements made with intent to evade the tax.

(2) The deduction of "employees' bonuses" which it is intended shall not be paid and which it is stated will never be paid, and of salaries which during a period of four months have been increased by 400 per cent, apparently to decrease profits (although without the increase they exceeded the average salary paid by corporations doing similar business), constitutes evidence sufficient to prove "a false or fraudulent

understatement with intent to evade the tax" within Section 250 (b) of the Revenue Act of 1918.

WAYNE JOHNSON,
Solicitor of Internal Revenue.

Approved.

WM. WILLIAMS,
Commissioner of Internal Revenue.

Noted.

P. S. TALBERT,
Chairman Committee on Appeals and Review.

EXTRACT FROM LETTER FROM COMMISSIONER TO COLLECTORS, DATED AUGUST 13, 1924

TAXES ASSESSED AFTER THE ENACTMENT OF THE REVENUE ACT OF 1924

If income, excess-profits or war-profits taxes imposed by the Revenue Acts of 1916, 1917, 1918, or 1921 are assessed after the enactment of the Revenue Act of 1924, they are to be computed, either as deficiency, or as interest, penalty, or other addition to the tax, as if the Revenue Act of 1924 had not been enacted, but they are to be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of income taxes imposed by the Revenue Act of 1924. (See Section 280 of the Revenue Act of 1924.)

It is, therefore, necessary in the case of taxes imposed by the Revenue Acts of 1916, 1917, 1918, or 1921 to determine the date of assessment for the purpose of ascertaining whether or not the provisions of the Revenue Act of 1924 are applicable to the particular case. An assessment is made on the date when the assessment list is signed by the Commissioner.

LETTER FROM COMMISSIONER TO COLLECTORS DATED MAY 5, 1919

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., May 5, 1919.

COLLECTORS OF INTERNAL REVENUE:

Office Procedure No. VIII, dated April 26, 1919, instructs Collectors of Internal Revenue to forward to this office with tentative assessment list April 30th all final returns filed by that date and to repeat the operation May 31st.

You will please advise this office by *return mail* the approximate number of returns, Form 1040, and the approximate number of returns, Form 1120, which will accompany your April 30th list. On May 31st you will give like advice relative to the May 31st list.

DANIEL C. ROPER,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1930